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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19	)	
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

RESPONSE TO PETITION FOR CLARIFICATION

The Sunshine Network hereby responds to the Petition of WJB-TV, Fort Pierce Limited Partnership ("WJB"), for clarification of the Commission's First Report & Order in the captioned docket. Sunshine responds only because, as explained below, (1) the Petition is based on, and presents to the Commission, misstated facts, and (2) it seeks an interpretation and application of the Commission's new rules regarding exclusive programming contracts that does not appear to have been intended by the First Report & Order, that is commercially unreasonable and that would not serve the public's interest, as previously determined by the Commission.

First, WJB's petition misstates the facts surrounding its request for permission to exhibit the Sunshine Network's programming. Although negotiations did occur between the Network and WJB regarding affiliation, no agreement was, or has yet to be, entered into. As WJB was informed by the Network, any such

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proposed agreement was subject to various conditions, including review by the Network's counsel. As a result of that review, and as Sunshine informed WJB, it was determined that the Network could not then extend carriage rights to WJB because of preexisting contractual program exclusivity commitments to an affiliate serving the same community. Moreover, although Sunshine Network provided WJB with information regarding the type of equipment it would need in order to carry the Network's programming if an affiliation agreement was entered into, Sunshine Network did not advise WJB that it should, prior to execution of a program affiliation contract, purchase such equipment, print line-up cards reflecting carriage of the Network's programming, or advise its customers that WJB would be carrying the Network's programming at any particular time in the future. Simply stated, if WJB did in fact purchase equipment and inform its customers of an impending launch of Sunshine Network service prior to completion of contract negotiations, then it jumped the gun and acted in a commercially unreasonable manner, for which the Sunshine Network cannot be blamed.

Second, although WJB may be frustrated in having to wait, during the 120-day transition period, for the right to carry the Sunshine Network's programming, this merely reflects the balance that the Commission has struck between, on the one hand, the object of making programming available to alternative multi-channel video providers and, on the other hand, the need to

allow a reasonable period within which networks and their affiliates can renegotiate, to the extent necessary, program contracts containing exclusivity provisions. Contrary to WJB's assertion, Section 628(b) of the 1992 Cable Act was not intended to immediately invalidate all exclusivity agreements as of the Act's effective date, December 4, 1992. Instead, in Section 628(c), Congress specifically delegated to the Commission the task of promulgating rules designed to govern the phase-out of such agreements, thus contemplating that the ban on exclusive contracts would become effective at some later date.[1/]

The Commission, in turn, has discharged its duty under Section 628(c) by promulgating regulations that generally prohibit such agreements (see 47 C.F.R. §76.1002(c)) but also provide for a brief transition period during which cable networks and their affiliates are to be allowed to complete the complex task of renegotiating existing carriage arrangements to eliminate exclusivity provisions (see 47 C.F.R. §76.1002(f)). The clear import of these regulations and the First Report & Order is that existing exclusivity provisions were not to be immediately invalidated but, rather, could continue to be honored during the transition period, while the parties to those contracts renegotiate their affiliation agreements to take account of the loss of such

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1/ The specific terms of Section 628(c), relating to exclusive program contracts, clearly govern over the more general provisions of Section 628(b), which does not even make reference to such agreements.

rights and the resulting need to alter rates and other terms.[2/] In short, neither Congress nor the FCC intended to precipitously pull the rug out from underneath such business relationships, but rather intended to provide a brief but necessary transition period in which such agreements could be brought into compliance with the new statutory and regulatory framework.

WJB's contention that the prohibition of exclusive program contracts should be deemed effective immediately upon the enactment of the 1992 Act, or alternatively on July 16, 1993, the effective date of the Commission's program access rules, would render the transition period provision of Section 76.1002(f) of the Rules meaningless, and would create chaos in the cable programming industry. For example, if program exclusivity provisions were rendered immediately unenforceable, would an affiliate still be required to pay its full prior program rights fee during the period in which the parties were renegotiating the rate provisions of their affiliation agreement? Likewise, would the affiliate still be subject to the same obligations regarding promotion of the network's programming if it no longer was entitled to exclusive distribution rights? And, if the affiliate is to

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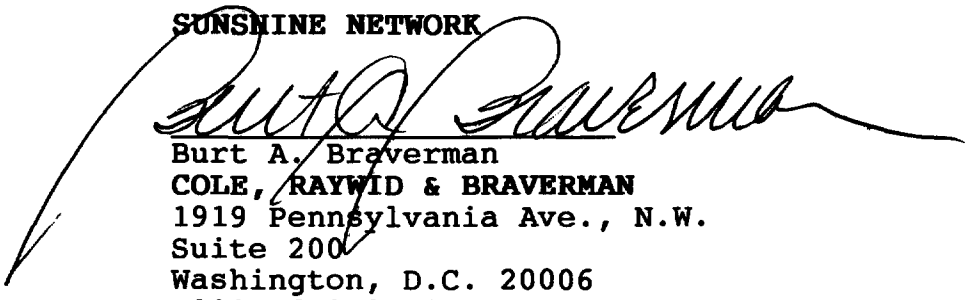
2/ Nothing in 47 C.F.R. §76.1002 or the First Report & Order supports WJB's assertion that the 120-day transition period was intended to apply only to discrimination violations, not exclusivity violations. See Petition at 4, n. 1. Indeed, subsection (f) ("Application to existing contracts") provides that the transition period applies to "the requirements specified in this subpart...." (emphasis added), not just in Section 76.1002(b) ("Discrimination in prices, terms or conditions").

have subdistribution rights, how can it exercise those rights before it and the network have negotiated the terms governing subdistribution? As the Commission has learned, somewhat painfully, in implementing its new rate regulations, the public is not served by attempts to rush forward with implementation of new rules before important questions, such as these, have been answered. While public policy may, as WJB asserts, want an early implementation of Section 76.1002(c), the Commission has appropriately determined that a brief transition period is both necessary and appropriate.

It has always been Sunshine Network's policy and practice to make its programming available to all qualified persons, including wireless cable operators, subject to preexisting contractual obligations with existing affiliates. With the Commission's adoption of Section 76.1002(c), Sunshine Network will bring any exclusive program contracts that are not exempt under Section 76.1002(e) into compliance with the new regulations. However, Section 76.1002(f) makes clear that during the 120-day transition period, while the Network accomplishes that task, it

Respectfully submitted,

SUNSHINE NETWORK



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June 15, 1993

CERTIFICATE OF SERVICE

I, Burt A. Braverman, do hereby certify that a copy of the Response to Petition for Clarification was mailed, first-class mail, postage prepaid, this 15th day of June, 1993 to:

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